

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY DALE HINES,)	2:98-cv-0784-GEB-EFB
)	
Petitioner,)	DEATH PENALTY CASE
)	
v.)	<u>ORDER</u>
)	
EDDIE YLST, Acting Warden,)	
)	
Respondent.)	
_____)	

On November 15, 2005, a magistrate judge filed recommendations ("November 15 recommendations") that summary judgment be entered against Petitioner on his penalty phase claims. Petitioner filed objections to the November 15 recommendations on December 15, 2005, in which he indicated that the issues in the November 15 recommendations should not be reached before the district judge reconsiders the magistrate judge's Order filed October 19, 2004, ("October 19 Order") which denied Petitioner's requests to expand the record.¹

¹ These orders and filings concerning the same were just recently brought to the undersigned's attention. A procedure has been established that will result in earlier discovery of such filings.

1 The October 19 Order denied Petitioner's requests on both
2 procedural grounds and the merits. On November 3, 2004, Petitioner
3 filed a request for reconsideration of the October 19 Order. The
4 magistrate judge held Petitioner's motion was procedurally defective
5 because Petitioner "failed to develop the factual basis of a claim in
6 State court proceedings." (October 19 Order at 4.) The basis for
7 this conclusion is unclear. Respondent's opposition brief filed
8 August 6, 2004, appears to concede that "Petitioner did make an effort
9 to develop facts [concerning certain of his record expansion requests]
10 while the matter was in state court and that the state court
11 proceedings ended before funds became available." (Opp'n to
12 Petitioner's Supplemental Mem. in Supp. of Req. to Expand the R. on
13 Penalty Phase Issues at 3.)

14 Further, the magistrate judge appears to have relied on the
15 wrong Ninth Circuit standard when denying Petitioner's request to
16 expand the record with certain mitigating evidence that Petitioner
17 contends should have been presented at the penalty phase of his trial.
18 Specifically, the magistrate judge stated:

19 The Ninth Circuit refuses to "impose a duty on
20 attorneys to require sufficient background
21 material on which an expert can base reliable
22 psychiatric conclusions, independent of any
23 request for information from an expert."
24 Hendricks v. Calderon, 70 F.3d 1032, 1038-39 (9th
Cir. 1995). Thus, trial counsel were not
ineffective in failing to provide background
material if [clinical psychologist Dr. Edward]
Grover never asked for it.

25 (October 19 Order at 9.) However, Hendricks concerned trial counsel's
26 performance in the guilt phase, whereas the Ninth Circuit reveals in
27 Hovey v. Ayers, 458 F.3d 892 (9th Cir. 2006), trial counsel has a
28 different responsibility in the penalty phase:

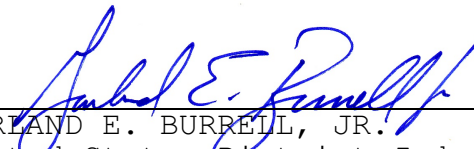
1 A defense attorney in the sentencing phase of a
2 capital trial has a professional responsibility to
3 investigate and bring to the attention of mental
4 health experts who are examining his client . . .
5 facts that the experts do not request. . . .
6 Regardless of whether a defense expert requests
7 specific information relevant to a defendant's
8 background, it is defense counsel's duty to seek
9 out such evidence and bring it to the attention of
10 the experts.

11 458 F.3d at 925 (internal quotations omitted).

12 Since it is unclear whether the record should be expanded as
13 Petitioner requests, and because a purpose of referencing the case to
14 the magistrate judge is to obtain assistance on clarifying such
15 issues, the October 19 Order is reversed and this case is remanded to
16 the magistrate judge for further consideration of these issues and for
17 any appropriate proceedings.² Further, since the November 15
18 recommendations should not have issued before Petitioner's requests to
19 expand the record on penalty phase issues were decided, these
20 recommendations are deemed withdrawn.

21 IT IS SO ORDERED.

22 Dated: November 13, 2006

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GARLAND E. BURRELL, JR.
United States District Judge

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